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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

RICHARD H. FRANKLIN,
FRANK SAUSER, AL TERRAULT,

Petitioners,

v.

TIMOTHY WILLIAM HISER,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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60 pp

QUESTION PRESENTED

In 1981, Alaska prison inmates filed a class action challenging a multitude of conditions under which they were confined. This litigation ultimately resulted in the entry of a consent decree, in 1990, binding all present and future inmates and establishing requirements for prison facilities and their operations and the rights, opportunities, programs, and services to be afforded to inmates. Among the rights established is the inmates' right of access to the courts and to legal materials. The question presented is whether the consent decree precludes an individual inmate's federal civil rights suit alleging a violation of his right of access to the courts as a result of being denied photocopies of purported legal materials.

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PETITION FOR WRIT OF CERTIORARI
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Richard H. Franklin, Frank Sauser, and Al Terrault ask this Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on September 3, 1996.

OPINION BELOW

The opinion of the Ninth Circuit Court is reproduced in the Appendix to this petition [App. 2 ff.]; it is also reported at 94 F.3d 1287. The order granting summary judgment in petitioners' favor entered in the United States District Court for the District of Alaska is reproduced in the Appendix; the district court did not issue an opinion.

JURISDICTION

This case involves a civil rights action filed by the respondent, Timothy Hiser. The decision of the Ninth Circuit was issued on September 3, 1996. This petition for certiorari is submitted within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

None

STATEMENT OF THE CASE

Cleary v. Smith

In 1981, Michael Cleary, an inmate incarcerated in a state prison, filed a class action suit in Alaska superior court on behalf of all present and future inmates in Alaska's correctional facilities. *Cleary v. Smith*, Case No. 3AN-81-5274 Civ. (Alaska Super. 3rd Jud. Dist.). Cleary's complaint and its subsequent amendments asserted a host of claims challenging all aspects of the conditions under which inmates were held in Alaska's prison facilities. After a partial settlement, a lengthy trial, and the initiation of appeals by both sides, the parties sought to resolve the issues raised by the litigation in a negotiated settlement. A final settlement agreement (FSA) was negotiated by the parties.

The FSA is a comprehensive consent decree consisting of nearly ninety pages. The FSA covers a broad range of issues including: facility requirements; operational requirements; the rights and opportunities to be provided inmates; rehabilitation programs and services; classification, administrative segregation, discipline and grievances; overcrowding; and future monitoring, modification and enforcement. It is binding, with exceptions not material to this case, not only on all inmates incarcerated in Alaska's correctional facilities at the time it was issued, but also on those "who . . . will in the future be incarcerated" in those facilities. [App. 25]

The proposed FSA was circulated to the inmates for comment before final approval. One inmate, Sidney Hertz, demanded inclusion of a term that free photocopying be provided. *See Hertz v. Cleary*, 835 P.2d 438, 440, 443 (Alaska 1992). The proposed FSA was amended in consideration of the inmates' comments, including those from Hertz. *Id.* at 440. The FSA did not include the express photocopying provision that Hertz sought. The

FSA was approved by the state trial court in September 1990. *Id.*

The FSA requires that the department of corrections provide inmates with access to a law library and to legal material. Legal materials are broadly defined to include research materials that lawyers commonly rely upon to prepare legal documents. Access to legal materials is provided by making available books containing the materials or by providing copies. (In the interest of brevity, the relevant provisions of the FSA are summarized here and quoted in footnotes in the Reasons for Granting the Writ section of this petition. Longer excerpts of relevant provisions are included in the Appendix and a complete copy of the FSA has been lodged with the Court.)

The FSA also provides that it is deemed a final judgment that is prospective in nature. It is enforceable only in the issuing court and only through the class counsel, as long as the plaintiffs remain represented by counsel. An individual inmate may present his or her own claim only after obtaining leave of the trial court.

Hiser's lawsuit

Al Terrault was the superintendent of the Fairbanks Correctional Center (FCC) at the time this litigation was commenced. The FCC is operated by the Alaska department of corrections. Richard Franklin and Frank Sauser are the respective former and current directors of institutions. Timothy Hiser is an inmate at the FCC.

In 1992, Hiser requested that photocopies be made of purported legal materials. At the time the FCC had a long-standing policy under which each inmate was entitled to unlimited photocopies needed "in connection with pending or proposed litigation" and five copies per week of documents not connected with litigation. [App. 21] Hiser's requests were denied by the prison officials because Hiser

had not provided satisfactory evidence that the photocopies were necessary to litigation he was pursuing. Hiser's administrative appeals were denied.

Federal District Court Proceedings

Instead of bringing his claim to the Alaska superior court as required by the *Cleary* FSA, Hiser filed a complaint against Franklin, Sauser, and Terrault in the United States District Court for the District of Alaska, seeking relief pursuant to 28 U.S.C. § 1983. He claimed that the prison officials' refusal to provide him with photocopies of purported legal documents violated his constitutional right of access to the courts. The state moved for summary judgment on res judicata grounds, asserting that Hiser's action was barred by settlement in *Cleary*. The district court granted summary judgment. [App. 17 ff.] Hiser appealed to the Ninth Circuit Court of Appeals.

Ninth Circuit Court of Appeals Decision

The United States Court of Appeals for the Ninth Circuit reversed the district court's order granting summary judgment in an opinion filed on May 2, 1996. After denying a petition for rehearing and suggestion for rehearing *en banc*, the court withdrew its opinion and issued a new one on September 3, 1996. *Hiser v. Franklin*, 94 F.3d 1287 (9th Cir. 1996). [App. 2 ff.] The Ninth Circuit held that none of Hiser's claims were barred by res judicata. It disagreed with the district court's view that Hiser's photocopying claim constituted a "subset" of the access to the courts claim asserted and resolved in *Cleary*. *Id.* at 1292. [App. 11] The court of appeals concluded that Hiser's declaratory relief claim was not part of the "'common nucleus of operative facts'" in *Cleary* and therefore could not be barred by the claims preclusion doctrine. *Id.* [App. 11 - App. 12] It also held that the FSA could not preclude Hiser's damages and injunctive relief

because he had not been an inmate prior to the negotiation of the *Cleary* FSA and, therefore, could not have asserted those claims in that case. *Id.* at 1291-92 (9th Cir. 1996). [App. 8 - App. 10]

Circuit Judge Rymer concurred in the panel's conclusion that Hiser's damages claim was not barred. *Id.* at 1294. [App. 15] However, she dissented from the decision with respect to the declaratory and injunctive relief claims. Noting that the *copying* of legal materials was at issue in *Cleary*, she refused to draw a distinction between that and the *photocopying* issue raised by Hiser. *Id.* [App. 16] Judge Rymer also observed that the department's policy regarding photocopying had been in effect and unchanged since as early as 1983. *Id.* [*Id.*] Judge Rymer concluded:

> Particularly in light of the extensive nature of the *Cleary* litigation and the comprehensive settlement reached so recently in that case (including, as it did, a specific provision on access to copying facilities), it is not inappropriate to expect a claimant seeking systemic relief with respect to copying to return to the *Cleary* court.

Id. [*Id.*]

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision in this case has essentially gutted the *Cleary* FSA, cast doubt generally on the effectiveness of consent decrees as a means of settling civil litigation, and divided Alaska's prison inmates into two legally distinct classes -- those incarcerated during the *Cleary* FSA negotiation process and those who entered the system afterwards.

The Ninth Circuit erred in applying the claim preclusion doctrine of res judicata. Claim preclusion is the "effect of a judgment in foreclosing relitigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984). A federal court is required to give a state court judgment the same preclusive effect it would have under the law of the state rendering the judgment. *Id.* at 81. Alaska generally follows the res judicata principles set forth in the Restatement (Second) of Judgments. *Hiser v. Franklin*, 94 F.3d 1287, 1291 (9th Cir. 1996). [App. 7]

The analysis and conclusion reached by the court of appeals is mistaken and requires review by this Court because it calls into serious question the prospective scope, operation, and validity of state court consent decrees as a means of resolving class actions. The court of appeals was mistaken in two respects: first, it failed to properly consider the comprehensive scope and apply the terms of the *Cleary* FSA, particularly the provision dealing with remedies for alleged violations of its terms; and, second, it treated Hiser's injunctive, declaratory, and damages claims as separate, severable, and independent.

Although the *Cleary* FSA does not specifically address inmates' right to *photo*copies, it expressly affords them the right to obtain *copies* of legal materials. It is therefore dispositive of all Hiser's claims. This was noted

by Circuit Judge Rymer in her dissent, but only in the context of Hiser's claims for injunctive and declaratory relief. *See Hiser*, 94 F.3d at 1294 (Rymer, J. dissenting). [App. 15 - App. 16]

The *Cleary* FSA requires that inmates be given access to "legal materials," i.e., those materials "commonly relied on by attorneys" in preparing legal documents."[1] "Legal materials" are defined broadly to include not only case and other legal authorities, but also any type of document that might be needed as an exhibit or document ancillary to a pleading, motion, memorandum, or other court filing.[2] "Access" is satisfied by providing copies of the materials.[3] In addition, the department is required to

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[1] Section V.G.1. provides in part:

> The Department [of Corrections] shall ensure that each inmate is provided regular access to a facility law library and legal materials.

[App. 27]

[2] Section V.G.2. provides in part:

> For the purposes of this paragraph, legal materials means those research materials, excluding computers or computer assisted research, commonly relied on by attorneys for the preparation of legal pleadings, documents, and briefs.

[App. 28]

[3] Section V.G.2. provides in part:

> The provision by the Department [of Corrections] of library books to be used on loan, or copies of

provide access to a typewriter, typing paper, and carbon paper to enable inmates to prepare their own legal pleadings and documents along with copies of them. [App. 33]

Some means of accurately reproducing documents has always been an integral part of access to the courts in the generic sense. Photocopying has undisputedly been the most widely used means for copying documents. Therefore, it is quite reasonable to interpret the FSA's use of the term "copies" as including photocopies. This assumption is bolstered by the fact that the department has had a policy regarding photocopying of legal and other materials for inmates "since at least 1983," seven years before the execution of the FSA. *See Hiser*, 94 F.3d at 1294 (Rymer, J. dissenting). [App. 16]

The *Cleary* litigants were presented with at least one inmate's demand that an express provision for photocopying be included in the FSA. *See Hertz v. Cleary*, 835 P.2d 438, 443 (Alaska 1992). The *Hertz* court specifically noted that "Hertz's comments, proposals and objections filed with the superior court *were considered in the negotiations and the FSA approval process*." *Id.* at 442 n.4 (emphasis added). Thus, contrary to the *Hiser* court's opinion, the *Cleary* litigants did consider, but apparently rejected, an express *photo*copying provision in the FSA. Moreover, the FSA was negotiated with both of the *Cleary* parties' knowledge of the department's long-standing policy with respect to copies. In essence, the FSA was negotiated on top of that policy. This leads to the undeniable conclusion that the FSA governs Hiser's claimed right to photocopies.

> pertinent case, statutes, rules, pertinent portions of digests or treatises, and the like, constitutes access within the meaning of this paragraph.

[App. 28]

The court of appeals concluded that Hiser's claimed right to photocopies is "based on a different set of operative facts and is not merely an alternative remedy or theory of recovery" than had been pursued in *Cleary*. *See Hiser*, 94 F.3d at 1292. [App. 12] This views the FSA far too narrowly. While the court correctly observed that "not . . . all facts related to court access are part of a 'common nucleus of operative facts,'" *id.* [*id.*], it ignored that photocopying had been part of the operative facts considered by the *Cleary* litigants, including the department's existing policy, and that the right to photocopies is clearly subsumed in a common sense, pragmatic interpretation of the FSA's provision relating to copying of legal materials.

One of the FSA's goals was to prospectively limit the number of suits regarding conditions of confinement brought by inmates. To effectuate this goal the state extended to inmates greater rights than would have been minimally required under the state and federal constitutions. *Cf. Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 383 (1992) (recognizing utility of consent decrees and that claimants may "negotiate more than what would have been ordered without the local government's consent"). For example, the FSA provides inmates with the rights to contact visitation, to correspond with other inmates, and to a fair and appropriate classification according to security and custody status. *Cf. Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 461 (1989) (no constitutional right to contact visits); *Turner v. Safely*, 482 U.S. 78, 91-93 (1987) (no right to inmate-to-inmate correspondence); *Meachum v. Fano*, 427 U.S. 215, 223,-29 (1976) (no constitutional right to classification scheme).

In exchange for the state's agreement to extend those rights and provide other substantial benefits regarding prison conditions, the inmates agreed to limit their recourse for claims covered by the FSA to seeking enforcement or modification through the *Cleary* court. The terms of the FSA make it clear that all claims alleging violations of the

FSA must be brought before the *Cleary* court as part of that case, not as a separate action. *See Hertz v. State, Dept. of Corrections*, 869 P.2d 154, 155 (Alaska 1994). *See also Gillespie v. Crawford*, 858 F.2d 1101, 1103 (5th Cir. 1988) (challenges to consent decree must be brought in issuing court to promote orderly oversight and avoid risk of inconsistent results).

In resolving the *Cleary* claims in such a comprehensive fashion with specific provisions for enforcement only in the *Cleary* court, the litigants insured that there would be continuity and consistency in the interpretation, implementation, and enforcement of the FSA. This has served the parties well in the time since the FSA was executed. These goals are thwarted by the Ninth Circuit's decision in this case. The *Cleary* court and parties are in the best position to interpret the FSA and to determine what it does and does not cover and what res judicata effect it may or may not have on Hiser's claims.

By refusing to give preclusive effect to the FSA, the Court of Appeals cast substantial doubt on the efficacy of consent decrees in resolving state class litigation concerning prison conditions. Application of a rule that denies preclusive effect to a consent judgment because the present claim seeks damages whereas the judgment settled only claims for declaratory and injunctive relief denies the state the benefit of its bargain in agreeing to the consent judgment. This is particularly so when, as in this case, the provisions of the consent judgment bear directly on the determination of liability for damages and set forth the exclusive remedy for violations. Whether a prior judgment should be given preclusive effect should not turn solely on the form of remedy sought by a plaintiff. For the same reasons, the FSA should be given preclusive effect as to the issue of liability even if Hiser is entitled to seek damages. That claim should be presented to the *Cleary* court.

Moreover, allowing an inmate to assert a separate claim for damages in a court other than the *Cleary* court

when the *Cleary* FSA is dispositive of the liability element of that claim gives rise to an administrative nightmare. The result is that the FSA applies to only some inmates, but not to others, or it applies only as to some aspects of their confinement, but not to others. Prison administrators are deprived of an important tool for uniform treatment of inmates which will, in turn, lead to morale and discipline problems among inmates and potentially give rise to a multitude of claims in both state and federal court. By carefully crafting their allegations, individual inmates will be able to litigate piecemeal around their settlement in *Cleary.*

It must be emphasized that the dismissal of Hiser's case does not leave him without a remedy. Under the FSA, he can ask the *Cleary* class lawyer to pursue the claim or he can apply to the *Cleary* court for proceed on a pro se basis.[4]

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[4] Section IX.B.1. of the FSA prescribes the procedures for modification, future enforcement, and obtaining relief from it. It provides:

> The terms of this agreement shall be considered a final judgment of a prospective nature which is binding upon the department and its successor in interest, and members of the class. As long as counsel represents the plaintiff class, any action in this case brought before the court seeking enforcement, modification, or interpretation of this agreement shall be presented through counsel, unless leave to proceed pro se is otherwise granted by the court.

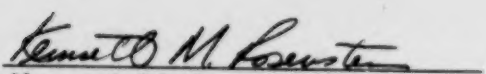
[App. 36]

CONCLUSION

The decision by the Ninth Circuit Court of Appeals has deprived the State of Alaska of the benefits it negotiated in the *Cleary* FSA. It has opened that agreement to differing interpretations by different courts and has cast doubt on the utility of using such agreements to settle class litigation. For these reasons, this Court should issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals.

DATED this 2nd day of December, 1996.

BRUCE M. BOTELHO
ATTORNEY GENERAL,
STATE OF ALASKA

By: 
Kenneth M. Rosenstein
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APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit in *Hiser v. Franklin* .... App. 2

Minute Order of the United States District Court for the District of Alaska in *Hiser v. Franklin* ..... App. 17

Affidavit of Judy Coleman, dated February 10, 1994 filed in the United States District Court for the District of Alaska in *Hiser v. Franklin* ..... App. 20

Excerpts from Final Settlement Agreement and Order of Alaska Superior Court in *Cleary v. Smith* ..... App. 23

United States Court of Appeals,
for the Ninth Circuit

Timothy William HISER,
Plaintiff-Appellant,

v.

Richard H. FRANKLIN;
Frank Sauser; Al Terrault,
Defendants-Appellees.

No. 94-35749
D.C. No. CV-93-00015-JKS

Appeal from the United States District Court
for the District of Alaska
James K. Singleton, District Judge, Presiding

Argued and Submitted
March 7, 1996.

Filed May 2, 1996.

Withdrawn Sept. 3, 1996.

Decided Sept. 3, 1996.

Before: Betty B. Fletcher, John T. Noonan, Jr., and Pamela Ann Rymer, Circuit Judges

Opinion by Judge Fletcher;
Judge Rymer, concurred in part, dissented in part, and filed opinion.

Counsel:

Steven L. Pevar, American Civil Liberties Union, Denver, Colorado, for plaintiff-appellant.

John K. Bodick, Assistant Attorney General, Juneau, Alaska, for defendants- appellees.

ORDER

The majority opinion and concurring and dissenting opinion filed May 2, 1996 are withdrawn, and the enclosed opinions are substituted in their place. As the appellee's petition for rehearing previously has been denied and the suggestion for rehearing en banc rejected as well, no further petitions for rehearing or rehearing en banc will be entertained. The mandate shall issue forthwith.

OPINION

FLETCHER, Circuit Judge.

Timothy Hiser, an inmate in the Alaska Department of Corrections' Fairbanks Correctional Center ("FCC"), appeals from the district court's grant of summary judgment in favor of defendant prison officials ("defendants" or "the State"). Hiser sought equitable relief and damages contending that defendants refused to photocopy his legal documents, thereby denying him access to the courts in violation of the Constitution. The district court did not reach the merits of the claim, instead granting summary judgment on the grounds of res judicata. The court reasoned that a class of all Alaska inmates, present and future, had entered into a comprehensive consent decree in state court in 1990 dealing with prison conditions, *Cleary v. Smith*, 3AN-81-5274 Civ. (3d Jud. Dist.Alaska); the consent decree devoted approximately nine pages to various issues related to inmates' "Access to the Courts" (although it did not address photocopying); and therefore Hiser's claim was or could have been litigated in the previous class action and is barred by res judicata.

We disagree. Because the issue of photocopying was never adjudicated in the *Cleary* litigation, Hiser's claims are not barred by issue preclusion. Neither are they barred by claim preclusion. Hiser's damages and individual injunction relief claims could not have been brought in the *Cleary* litigation, as the injury Hiser alleges did not occur until 1992 when his request for photocopying was denied. Although Hiser's class action challenge to the prison's photocopying policy could have been brought in the *Cleary* litigation, it nevertheless is not barred because it is based on a separate set of operative facts. We have jurisdiction under 28 U.S.C. § 1291 and reverse and remand.

I.

On August 3, 1993, after exhausting his administrative remedies, Hiser filed a section 1983 complaint in United States District Court for the District of Alaska contending that, from 1992 to the present, defendants violated his constitutional right of access to the courts under *Gluth v. Kangas*, 951 F.2d 1504, 1510 (9th Cir.1991) and *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977) by refusing to photocopy his legal documents. He sought declaratory and injunctive relief and damages. He asserted that defendants refused three requests by him to photocopy legal documents. His complaint alleged that inmates at FCC were "routinely denied photocopies of needed legal materials," that he himself "has on several occasions been denied needed copies of legal materials," and that the failure to provide copies "has caused plaintiff to suffer difficulty and harm in pursuing his legal claims."[1] To his complaint, Hiser

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[1] Although Hiser did not use the phrase "as applied," he clearly argued that his personal rights were violated by defendants' refusal of his request for photocopying. Thus, we reject the State's contention that Hiser only facially attacked the prison's photocopying policy.

attached, among other things, a grievance appeal response stating that "FCC will not make [copies] for you as you have no pending court case involved with this subject," and a response from defendant Franklin stating that "[w]e are under no obligation to photocopy anything, however, we do so if there is a valid reason. The burden is on you to demonstrate this reason."[2]

The State moved for summary judgment on the grounds of res judicata, contending that Hiser's photocopying claim "was or could have been raised" in *Cleary v. Smith*, 3AN-81-5274 Civ. (3d Jud. Dist.Alaska). Cleary was a state class action lawsuit brought on behalf of all present and future Alaska inmates. It sought (only) declaratory and injunctive relief against the Alaska Department of Corrections to redress a variety of prison conditions. It was filed in 1981. The final settlement agreement was approved by the court on September 21, 1990. The agreement is 88 pages plus appendices, with approximately nine pages devoted to topics related to access to the courts, such as materials in the law library and legal mail. No mention of photocopying is made. Even though the issue of photocopying was not addressed in the *Cleary* litigation, the magistrate judge recommended that summary judgment be granted on the grounds of res judicata. He concluded that there is no independent constitutional right to photocopying and that any such right is a component of the right to access to the courts, which

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[2] The State submitted an affidavit from FCC compliance officer Judy Coleman declaring that the State's policy provides for "free photocopying for legal materials for indigent inmates when they can demonstrate a need for such materials in connection with pending or proposed litigation, and for five free copies per week when they cannot make such a showing." No written memorialization of the policy was submitted. Hiser contends in his amended complaint that "[n]umerous inmates have been denied copies of legal materials because they have been unable to justify their need for such materials to defendants' satisfaction."

was comprehensively litigated. The district judge agreed with the magistrate judge's reasoning and entered summary judgment in favor of the State. Hiser timely appealed.

II.

The district court's grant of summary judgment on res judicata grounds is reviewed de novo. *International Union of Operating Engineers-Employers Const. Indus. Pension, Welfare & Training Trust Funds v. Karr*, 994 F.2d 1426,
1429 (9th Cir.1993).

III.

The preclusive effects of former litigation are commonly referred to as "res judicata." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 894 n. 1, 79 L.Ed.2d 56 (1984). "Res judicata is often analyzed further to consist of two preclusion concepts: 'issue preclusion' and 'claim preclusion.' " *Id.*

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. See Restatement, *supra*, § 27. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. Claim preclusion therefore encompasses the law of

merger and bar. See *id.*, Introductory Note before § 24.[3]

Id.

To determine the preclusive effect of the Cleary litigation on Hiser's photocopying claim, this court applies Alaska's res judicata law. *See id.* at 81, 104 S.Ct. at 896 ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered."). Alaska generally follows the Restatement (Second) of Judgments. *See State v. Smith*, 720 P.2d 40, 41 (Alaska 1986); *Tolstrup v. Miller*, 726 P.2d 1304, 1306 (Alaska 1986).

A.

Hiser's claims are not barred by issue preclusion. The Alaska Supreme Court has expressly said that "[t]he issue of photocopying was not raised in regard to the [final settlement agreement "FSA" in *Cleary*] and is not properly raised as a challenge to the FSA." *Hertz v. Cleary*, 835 P.2d 438, 440 (Alaska 1992). Issue preclusion only bars the relitigation of issues explicitly litigated and necessary to the judgment. Since the issue of photocopying was not adjudicated in the *Cleary* litigation, issue preclusion does not bar consideration of Hiser's photocopying claim. The State essentially acknowledges this, explaining that it is relying on the "claim preclusion," rather than "issue preclusion," prong of res judicata.

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[3] The term "res judicata" is sometimes used to refer specifically to "claim preclusion" and sometimes used to encompass both "claim preclusion" and "issue preclusion." *Migra*, 465 U.S. at 77 n.1, 104 S.Ct. at 894 n.1.

B.

Neither are Hiser's claims barred by claim preclusion. In *Hoffman Const. Co. v. Active Erectors & Installers, Inc.*, 969 F.2d 796 (9th Cir.1992), cert. denied, 507 U.S. 911, 113 S.Ct. 1258, 122 L.Ed.2d 656 (1993), this court noted that in Alaska, "res judicata covers 'relevant claims that could have been raised in the prior case,' but were not. A mere change in the legal theory asserted cannot revive an already barred action." Id. at 799 (quoting *DeNardo v. State*, 740 P.2d 453, 456 (Alaska 1987), *cert. denied*, 484 U.S. 919, 108 S.Ct. 277, 98 L.Ed.2d 239 (1987)). The State asserts that Hiser's photocopying claim is barred because it "could have been raised in *Cleary*."

1.

Hiser's claims for damages and individual injunctive relief are clearly not barred by res judicata because they could not have been brought in the *Cleary* litigation. Hiser was not even incarcerated at the time of the *Cleary* settlement agreement. His claims did not accrue until 1992-two years after the settlement agreement-when he requested and was denied photocopying. Therefore, Hiser's individual claims for damages and injunctive relief are not barred. *Accord* 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4455 (1995 supp.) ("Another obvious limitation on class action preclusion is that the judgment does not bar an individual claim based on events occurring after the judgment.").

Moreover, the general rule is that a class action suit seeking only declaratory and injunctive relief does not bar subsequent individual damage claims by class members, even if based on the same events. In fact, "every federal court of appeals that has considered the question has held that a class action seeking only declaratory or injunctive relief does not bar subsequent individual suits for

damages." *In re Jackson Lockdown/MCO Cases*, 568 F.Supp. 869, 892 (E.D.Mich.1983); *see, e.g., Fortner v. Thomas*, 983 F.2d 1024, 1030-32 (11th Cir.1993) ("It is clear that a prisoner's claim for monetary damages or other particularized relief is not barred if the class representative sought only declaratory and injunctive relief, even if the prisoner is a member of a pending class action."); Wright, Miller, & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4455 (1981 and 1995 Supp.) (collecting cases). In *Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984), the Supreme Court held that the plaintiffs' Title VII damages suit against their employer was not barred by the res judicata effect of a previous Title VII class action-even though the plaintiffs had been class members and witnesses in the previous action and thus could have brought their damages claim in that case. Finally, a leading treatise concludes that a member of a class generally should be free to bring an individual damages claim subsequent to a class action suit for declaratory or injunctive relief:

> The basic effort to limit class adjudication as close as possible to matters common to members of the class frequently requires that nonparticipating members of the class remain free to pursue individual actions that would be merged or barred by claim preclusion had a prior individual action been brought for the relief demanded in the class action. An individual who has suffered particular injury as a result of practices enjoined in a class action, for instance, should remain free to seek a damages remedy even though claim preclusion would defeat a second action had the first action been an individual suit for the same injunctive relief.

18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4455 (1981).

The district court's dismissal of Hiser's damages claim is contrary to this authority. Although these authorities do not specifically apply Alaska law, there is no Alaska case to the contrary and no reason to believe that Alaska's law would differ. Alaska follows the Restatement; in *Cooper*, the Supreme Court relied on the Restatement for its holding that the class members' subsequent individual damages claims were not barred by the previous class action lawsuit. Also, Alaska courts have relied on Wright, Miller and Cooper's treatise for res judicata analysis. *See, e.g., State v. Smith*, 720 P.2d at 42 n. 2. Finally, several of the cases holding that class members' subsequent damages claims are not barred have relied on notions of due process, which are applicable to state res judicata decisions as well. In *Wright v. Collins*, 766 F.2d 841, 847-49 (4th Cir.1985), for instance, the court reasoned that before a member of a class can be barred from an individual claim for damages, the class members must be given clear warning that individual claims may be lost. No such warning was given in the instant case. The court observed that a broad-gauged class complaint "should not mean that all future litigation involving harm to individual prisoners will be precluded." *Id.* at 848. If every member of the class were compelled to intervene to protect his individual claims, serious questions would be raised as to the adequacy of the class representatives, and the class action would become unmanageable. *Id.* at 849.

As amicus points out, prison class action litigation typically seeks only declaratory and injunctive relief. The purpose of a class action is to concentrate on an issue or issues all class members have in common. If every prisoner in the state of Alaska needed to join his or her own individual damage claim to the *Cleary* litigation or else lose it, the action would have been unmanageable. As it is, the case took over twelve years to resolve and ended in an 88 page consent decree-without a single individual damage claim being involved. The general rule that a class action for equitable relief does not bar subsequent individual damages suits recognizes and respects this reality.

For these reasons, Hiser's individual damages and injunctive relief claims are not barred by claim preclusion.

2.

a.

Even though a broad challenge to the prison's photocopying policy could have been brought in the Cleary litigation, Hiser's class action challenge to the prison's photocopying policy is not precluded either. Alaska res judicata law generally bars relevant claims that could have been brought in the earlier litigation. Specifically, Alaska follows the Restatement (Second) of Judgments, which forecloses "litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit." *Migra*, 465 U.S. at 77, 104 S.Ct. at 894 (citing Restatement (2d) § 24, Introductory Note) (emphasis added). A matter should have been advanced in the earlier litigation if it is part of the same "transaction, or series of connected transactions, out of which the action arose." *Smith*, 720 P.2d at 41 (quoting Restatement (2d) § 24). "The expression 'transaction, or series of connected transactions,' is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the cases. . . . In general, the expression connotes a natural grouping or common nucleus of operative facts." Restatement (2d) § 24 comment b.

The district court reasoned that Hiser's photocopying claim was merely a subset of an "access to the courts" claim, which had previously been brought in the *Cleary* litigation, and was therefore barred. We do not believe that all facts related to court access are part of a "common nucleus of operative facts" and therefore create one transaction and a single claim. The concern behind claim preclusion is that a plaintiff should not be able to relitigate the same facts under a different legal theory. Id. § 24.

Although Hiser's photocopying challenge implicates the same right of "access to the courts" as was addressed in the *Cleary* litigation, see *Bounds*, 430 U.S. at 828, 97 S.Ct. at 1498; *Lewis v. Casey*, --- U.S. ----, ---- - ----, 116 S.Ct. 2174, 2179-80, 135 L.Ed.2d 606 (1996), it is based on a different set of operative facts and is not merely an alternative remedy or theory of recovery.[4]

Thus, under the Restatement's transactional approach, Hiser's challenge to the prison's photocopying policy is not barred by claim preclusion. Especially taking into account that the first action was a class action for which Hiser was an unnamed, absent class member, his claim should not be precluded. *Cf. Ferguson v. Department of Corrections*, 816 P.2d 134 (Alaska 1991) ("Out of concern that it is unfair to preclude a non-named class member from subsequent litigation, many courts modify the traditional res judicata tests when the initial litigation is a class action."). Arguably, everything related to prison life could conceivably be deemed part of "a series of transactions" when a broad-based class action is brought, but if this is how claim preclusion is defined in the class action context, it would essentially make class actions

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[4] We note that the Cleary consent decree requires the State to provide typewriters and carbon paper to inmates. These would not appear to be adequate substitutes for photocopying under all circumstances, however. For example, an inmate might need to copy something he didn't write himself in order to pursue his claim, for which purpose carbon paper would be useless. In any event, the issue at this juncture is only whether res judicata bars consideration of the merits of Hiser's claim. That carbon paper and typewriters were addressed in the consent decree should not mean that the State's photocopying policy and practices may never be challenged. *Cf. Crowe v. Leeke*, 550 F.2d 184 (4th Cir.1977) (holding that prior class action challenging prison's mail regulations in general did not bar subsequent class action challenge to prison's procedure allowing mail from attorneys to be opened and inspected outside the presence of the inmate-addressee).

obsolete. After one prisoner class action had been filed, no "related" claims could ever be filed. No responsible attorney would file a class action challenging a prison condition, because by doing so, all future claims by prisoners challenging an unconstitutional condition could be barred-even if the specific issue was never raised in the previous litigation. The Alaska Supreme Court's decision in *Ferguson v. Department of Corrections*, 816 P.2d 134 (Alaska 1991) recognizes that res judicata must be applied carefully in the class action context. In *Ferguson*, the plaintiff wished to challenge the Alaska Department of Corrections' drug testing policies. The plaintiff was, like Hiser, "technically a party in the *Cleary* litigation," since the *Cleary* litigation included all future Alaska inmates. *Id.* The State moved to dismiss, arguing that *Cleary* barred the plaintiff's claim on the grounds of res judicata. The Department of Corrections' drug testing policies had in fact been evaluated on crossmotions for summary judgment in *Cleary*. *Id.* at 138. Accordingly, the superior court dismissed the complaint as barred by res judicata. The Alaska Supreme Court reversed. The court noted that a person cannot be bound by a judgment unless he has had the opportunity to be heard in opposition to the judgment. The court concluded that Ferguson had not "been fully heard on the issue of the prison's drug testing policies." *Id.* Even though the drug testing had been challenged in *Cleary*, it "constituted a relatively insignificant aspect of the litigation and negotiations." *Id.* The court determined that "the *Cleary* plaintiffs did not adequately represent Ferguson's interests as to the reliability of the EMIT test; consequently, the provisions in *Cleary* related to drug testing cannot be given res judicata effect." *Id.* at 139. "Although concerns as to [the test's] reliability were raised in *Cleary*, they were not given the careful consideration they deserve, and it would be unjust to block future consideration now." *Id.*; *cf. Richards v. Jefferson County*, --- U.S. ----, ----, 116 S.Ct. 1761, 1769, 135 L.Ed.2d 76 (1996) ("Because petitioners received neither notice of, nor sufficient representation in, the *Bedinford* litigation, that adjudication, as a matter of federal due process, may not

bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property.").

Hiser's situation is even more compelling. In *Cleary*, the drug testing policy was challenged-albeit in a cursory fashion. Thus, not only was Ferguson's a related claim that could have been raised, it actually was raised. Even so, the Alaska Supreme Court determined that res judicata did not bar the claim, since "Ferguson was not fully heard on the issue." Hiser was not heard at all on the issue of photocopying, much less "fully heard on the issue." Accordingly, just as Ferguson's interests in challenging the drug testing policy were not "adequately represent[ed]" in the *Cleary* litigation, Hiser's interests in challenging the photocopying policy were not "adequately represent[ed]."[5]

The State suggests that Ferguson is distinguishable because the Cleary plaintiffs' attorney at the time the drug testing issue was litigated was not very good, whereas the Cleary plaintiffs' attorney at the time of the consent decree, Mr. Volland, is excellent. We think the distinction untenable. The Alaska Supreme Court did not allow Ferguson's case to go forward because it concluded that the plaintiffs' attorney was incompetent. Rather, the Court allowed Ferguson's case to go forward because the issue with which he was concerned, drug testing, had "not been given the careful consideration [it] deserve[d]" in the *Cleary* litigation; thus, the *Cleary* plaintiffs had not adequately

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[5] Because Ferguson's concerns were not sufficiently addressed in *Cleary*, Ferguson was entitled to bring an independent action challenging the prison's drug testing policy. He was not relegated to reopening the *Cleary* litigation. So, too, Hiser may bring an independent action challenging the prison's photocopying policy. Although a court may, in appropriate cases, transfer or consolidate a plaintiff's individual claim with an existing class action, the court may not simply dismiss the claim as barred by res judicata. *See, e.g., Fortner*, 983 F.2d at 1030-32.

represented Ferguson's interests in challenging the drug testing. Similarly, Mr. Volland may be an excellent attorney, but because the State's photocopying policy was given no consideration in the *Cleary* litigation, much less "careful consideration," the *Cleary* plaintiffs did not adequately represent Hiser's interests in challenging the policy. Thus, under *Ferguson*, Hiser's class action challenge to the State's photocopying policy is not barred by res judicata.

IV.

Hiser's photocopying claims are not barred by res judicata. We reverse and remand for further proceedings not inconsistent with this opinion.[6]

RYMER, Circuit Judge, concurring in part, dissenting in part:

I agree that Hiser may pursue his claim for damages, as he was not incarcerated in Alaska when *Cleary* was decided and the actions about which he complains did not occur until almost a year later. Under these circumstances, the *Cleary* judgment cannot be dispositive of his individual claim, and I concur in the majority's conclusion in this respect.

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[6] By our ruling, we intimate no view of the merits of Hiser's claim. Although res judicata does not bar Hiser's claim, Hiser must, in order to prevail, still establish that the alleged shortcomings in the prison's photocopying policy have hindered, or are presently hindering, his efforts to pursue a nonfrivolous legal claim. See *Lewis*, --- U.S. at ---- - ----, 116 S.Ct. at 2179-82. An inmate has a right to photocopying under *Bounds* when, and only when, necessary to guarantee him meaningful access to the courts. *See id.*

However, I do not agree that Hiser's claims for declaratory and injunctive relief survive. Hiser complains about the right to photocopy. While photocopying was not an issue in *Cleary*, copying was. Alaska's policy regarding photocopying of legal and other materials for inmates has remained unchanged since at least 1983. It therefore could have been raised as part of the class challenge that inmates were denied access to the courts in part on account of the policy on copying. Particularly in light of the extensive nature of the *Cleary* litigation and the comprehensive settlement reached so recently in that case (including, as it did, a specific provision on access to copying facilities), it is not inappropriate to expect a claimant seeking systemic relief with respect to copying to return to the *Cleary* court.

Nor can I agree with the majority that *Ferguson v. Dep't of Corrections*, 816 P.2d 134 (Alaska 1991), stands for the broad proposition that we must disregard the principles of res judicata whenever a non-named class member wishes to start anew. Rather, *Ferguson* simply tells us that "there must have been a full and fair opportunity to litigate the issue before res judicata can be applied," and that such an opportunity has been provided where, as here, "the class representatives are found to have made a competent attempt to protect the interests of the individual who now seeks to litigate the issue." *Id.* at 138.

I would, therefore, affirm the district court on this issue.

MINUTES OF THE
UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

Timothy Hiser v. Richard Franklin, et al.
Case No. F93-0015 CV (JKS)

By: THE HONORABLE JAMES K. SINGLETON

Deputy Clerk: Marvel Hansbraugh, Case Management: 271-5575*

PROCEEDINGS: ORDER FROM CHAMBERS

Defendants seek summary adjudication of Timothy Hiser's civil rights claims, which by attrition now are limited to his photocopying claims based on Gluth v. Kangas, 951 F.2d 1504, 1509-11 (9th Cir. 1991). Docket No. 27. Magistrate Judge Branson recommends that the motion for summary judgment be granted. He concludes that the global settlement of inmate claims in state court in Cleary v. Smith, 3AN-81-5274 Civil, operates as res judicata under applicable Alaska law to bar this suit. Docket Nos. 42 and 48. Hiser objects, relying on Brown v. Ticor Title Ins. Co., 982 F.2d 386 (9th Cir. 1992), cert. dismissed, 114 S.Ct. 1359 (1994). Hiser contends that the quality of photocopying was not specifically addressed in the Cleary litigation, and that because the Cleary litigants sought injunctive relief and not damages, he had no opportunity to option out of the class action and thereby preserve his right to independently litigate. See Docket Nos. 43 and 47. When Magistrate Judge Branson rejected these arguments, he noted that there is no independent constitutional right to photocopies and that any such "right" is a component of the right to access to the courts. See Gluth, 951 F.2d at 1510. The right of access to the courts was vigorously debated in the prior litigation and a reasonable compromise

reached that assures that each person incarcerated in Alaska will have access to both state and federal courts under the standards articulated in Bounds v. Smith, 430 U.S. 817 (1977).

I have exercised my independent judgment and conducted a de novo review of the record. Magistrate Judge Branson is correct that Hiser's subset of the access requirement issue is barred by res judicata under Alaska law, which is applicable to this case under Ninth Circuit precedent. See Haphey v. Linn County, 924 F.2d 1512, 1515 (9th Cir. 1991)[1]

Magistrate Judge Branson also noted that Hiser had not made a case for punitive damages and inferred that Hiser's photocopying complaints were insubstantial because the state does allow reasonable access to photocopying. Magistrate Judge Branson, apparently anticipating a qualified immunity argument, concluded that the Cleary judgment, coupled with the existing photocopying rule, precluded a viable civil rights claim because reasonable correctional officers could rely upon that policy. My

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[1] Under Magistrate Judge Branson's reasoning, Brown might preserve a truly independent claim otherwise subject to collateral estoppel, but would not preserve a derivative claim or theory subsumed within a claim vigorously argued. When we bear in mind that Bounds did not provide a textbook explanation of how inmates were to be assured "access," while Cleary definitively addressed "access" and the Alaska policy attempts to provide "access," I am satisfied that Magistrate Branson is correct, and conclude that an inmate cannot relitigate the "access" issue by advancing variant theories from those previously pursued. Thus, Hiser's objections at Docket No. 49 miss the point which differentiates claims actually litigated from claims that were not. The Cleary decision resolved the access issue; it did not resolve every conceivable prisoner complaint. Thus, while claims involving "access" are not currently litigable, truly independent claims are still litigable. See Ferguson v. State, 816 P.2d 134, 137-38 (Alaska 1991).

conclusion that Hiser cannot state a claim for relief moots consideration of these additional issues.

IT IS THEREFORE ORDERED;

Defendant's motion for summary judgment at **Docket No. 27** is **GRANTED.** The Clerk of Court shall enter judgment in favor of the Defendants and against the Plaintiff.

Entered at the direction of the Honorable James K. Singleton, United States District Court Judge, by Ardel Burritt, secretary to Judge Singleton.

DATE: July 5, 1994 SECRETARY'S INITIALS: ab

* ALL INQUIRIES REGARDING THE SCHEDULING OR CALENDARING OF THIS CASE SHOULD BE DIRECTED TO THE ABOVE-INDICATED CASE MANAGER.

C.F. No. 1

Copies to:
Jannott
Stark
O&J file
7-6-94 cpb

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

TIMOTHY WILLIAM HISER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. F93-15 CIV.
	)	(JKS)
RICHARD H. FRANKLIN, Director, Division of Institutions, Alaska Dept. of Corrections et al,	)	
	)	
Defendants.	)	

AFFIDAVIT OF JUDY COLEMAN

State of Alaska)
)ss
Fourth Judicial District)

I, Judy Coleman, state after being duly sworn based upon my personal knowledge that :

1. I have been employed with the Alaska Department of Corrections at the Fairbanks Correctional Center (FCC) since August 1983. Since August 1986, I have served as the compliance officer at FCC;

2. In addition to overseeing FCC's compliance with the requirements of the 1990 Final Settlement Agreement and Order (FSA) in the prisoner class action suit, Cleary v.

Smith, 3AN-81-5274 Civ., and prior to 1990, with the requirements of the 1983 Cleary Partial Settlement Agreement (PSA) and 1985 Memorandum Decision following trial in Cleary, my responsibilities as compliance officer also include overseeing responses to inmate grievances at FCC. I also serve as the staff member at FCC who responds to inmate requests for photocopying of legal and other materials, and have done so since I became compliance officer in 1986;

3. Since August 1983, when I began work at FCC, and for an unknown period before that, FCC has had essentially the same policy regarding photocopying of legal and other materials for inmates. This policy provides for free photocopying for legal materials for indigent inmates when they can demonstrate a need for such materials in connection with pending or proposed litigation, and for five free copies per week when they cannot make such a showing. As I stated, this policy has remained essentially unchanged since before 1983;

4. FCC and all other correctional facilities in Alaska also accomodate [sic] inmates' needs for access to the courts in a number of ways as required first, by the Cleary PSA, and since 1990, by the FSA. These are set out in the FSA at pages 34-39, and include access to typewriters, pens, paper and carbon paper. Cleary FSA § V.G.12 at 39. Further your affiant sayeth not.

/s/
Judy Coleman

Subscribed and sworn to before this 10 day of February 1994.

/s/ Charlette Charlton
Notary Public
My Commission expires 5-13-97

[SEAL]

IN THE SUPERIOR COURT FOR
THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT

MICHAEL CLEARY, DEMETRY KENEZUROFF, HARRY MORGAN, BOB OWEN, THOMAS WALTER, and ERNEST MORGAN, on behalf of themselves and all other persons who are now or will be similarly situated,

Plaintiffs,

vs.

ROBERT SMITH, Commissioner, Department of Health and Social Services; ROGER ENDELL, Director, Division of AdultCorrections, Department of Health and Social Services; VERNON CAULKINS,Assistant Director, Division of Adult Corrections, Department of Health and Social Services; REVEREND WILLIAM LYONS, BEVERLY DUNHAM, FREDERICK PETTYJOHN, AL WIDMARK, and CONRAD MILLER, all of the Alaska Parole Board; SAMUEL TRIVETTE, Executive Director of the Alaska Board of Parole, and their subordinates, employees and agents,

Defendants.

No. 3AN-81-5274 CIV

FINAL SETTLEMENT AGREEMENT AND ORDER

[EXCERPT]
[a full copy has been lodged separately]

I. COVERAGE.

A. This Settlement Agreement between the undersigned parties represents a full and final disposition of the pending claims in this case, including those issues before the Supreme Court in Case No. S-1498, S-1573 and S-3555.

B. This agreement supersedes the Partial Settlement Agreement and order in this action, dated January 23, 1983, including any subsequent memoranda of understanding. This agreement also incorporates the Memorandum Decision and Findings of the Superior Court issued March 1, 1985, the findings and conclusions of Special Master Sanders issued in relation to contempt motions filed between 1983 and 1988, the recommendations of Standing Compliance Monitor Reardon made since January 1988, and of Standing Compliance Monitor Charles Campbell made since November 1, 1989, and the rulings of the trial court issued in relation to the findings of both Master Sanders and Monitor Reardon on questions of interpretation or compliance with the Partial

Settlement Agreement of 1983. This agreement also resolves each point of appeal raised by both parties in Supreme Court Case Nos. S-1498 and S-1573, regarding the Findings and Decision of the Superior Court after trial in 1984.

C. Throughout this agreement, the named defendants are referred to collectively as "the Department." The duties imposed on the Department by this agreement shall apply to any successor department, division, or agency of the state of Alaska which is statutorily responsible for administration of the state's adult correctional facilities.

D. Upon approval by the Superior Court, the provisions of this agreement will become binding on the Department and members of the plaintiff class, Subclasses A and B. These subclasses include all inmates, with some exceptions, who are or will in the future be incarcerated in correctional facilities owned or operated by the state.[1]

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[1] Subclasses A and B do not include individuals charged only with a federal offense or offenses, individuals awaiting extradition with no pending charges other than a federal offense or offenses, individuals temporarily incarcerated because of involuntary mental commitment proceedings, and individuals

Members of the class who are known as Subclass C, and who consist of Alaskan inmates serving their sentences in Federal Bureau of Prisons facilities, are not parties to this agreement, except insofar as their treatment upon return to Alaska is concerned.

E. The parties acknowledge that an inmate may waive, in writing, the application of any provision of this agreement; however, the Department first has the burden of establishing that the waiver was made knowingly and voluntarily.

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taken into protective custody pursuant to AS 47.37.170 because of their intoxication.

V. RIGHTS & OPPORTUNITIES TO BE PROVIDED INMATES

. . . .

G. Access to the Law Library and Legal Materials.

1. The Department shall ensure that each inmate is provided regular access to a facility law library and legal materials. Absent unusual circumstances, the Department shall provide an inmate access to the law library within one working day of the inmate's request.

2. The Department shall provide an inmate who is involved in or initiating civil or criminal litigation or appeals, timely access to civil and criminal law materials which are not available through the facility law library. Access to these materials shall be provided at no charge to the inmate from the Department's central law library or other available sources. Timely access is accomplished if the Department provides the requested materials within 10 days to two weeks for routine requests, within three to five days when the inmate has provided evidence of an ongoing civil or criminal court filing deadline

which must be met, and within 40 hours, excluding weekends and holidays, when the inmate has to file a reply memorandum under state or federal court civil rules, or a filing deadline of less than 5 days imposed by a court. For the purposes of this paragraph, legal materials means those research materials, excluding computers or computer assisted research, commonly relied on by attorneys for the preparation of legal pleadings, documents, and briefs. The provision by the Department of library books to be used on loan, or copies of pertinent cases, statutes, rules, pertinent portions of digests or treatises, and the like, constitutes access within the meaning of this paragraph.

3. The law library at each facility shall be large enough to hold the materials required by this agreement, and to accommodate inmate use according to the following standards:

(a) For existing facilities, the law library shall be large enough to accommodate two or more inmates at one time.

(b) For new facilities with a population of up to 50 inmates, the law library shall be large enough to accommodate at least two inmates at one time.

(c) For new facilities with a population of 51-100 inmates, the law library shall be large enough to accommodate at least three inmates at one time.

(d) For new facilities with a population of 101-200 inmates, the law library shall be large enough to accommodate at least four inmates at one time.

(e) For new facilities with a population of 201-400 inmates, the law library shall be large enough to accommodate at least five inmates at one time.

(f) For new facilities with a population of over 400 inmates, the law library shall be large enough to accommodate at least six inmates at one time.

4. The Department shall ensure that the law library remains open for inmate use for the following minimum hours:

(a) For facilities with a population of up to 50 inmates, at least four hours per day.

(b) For facilities with a population of up to 100 inmates in the facility, at least five hours per day.

(c) For facilities with a population of over 100 inmates in the facility, at least six hours per day.

5. If the library is not open on weekends, then the time lost thereby must be made available on weekdays. If the law library is used to accommodate other activities, such as classes or meetings, the law library must be open for exclusive library use for the minimum hours provided in Paragraph 4 above.

6. By December 31, 1991, the law library at each facility shall contain, at a minimum, the materials listed in Appendix B hereto.

7. By December 31, 1991, the Department shall maintain in its Spring Creek law library the Federal supplement, the Federal 2d Reporter, the United States Supreme Court Reporter, and Shepard's citations for these reporters, beginning with the year 1960. These materials are being required at the Spring Creek facility due to its status as Alaska's only maximum security facility and because of the large number of long term sentenced prisoners at the facility. Access to these materials for prisoners at other facilities will be provided upon request for particular cases through the Department's central law library.

8. The Department shall maintain at its Central Law Library a manual on immigration law and procedure, and the applicable volume of the code of Federal Regulations on immigration law. These materials will be made available to inmates upon request.

9. The Department shall provide an experienced or trained law librarian or assistant law librarian

at each facility, who may be an inmate, and who shall be available to assist inmates in the use of the law library.

10. The Department shall ensure that the librarian has the ability to perform legal research, has a basic understanding of the differences between the state and federal judicial systems, is capable of referencing and finding rules of procedure, and knows the resources available in the central and facility law library. When a vacancy occurs, the Department shall have a reasonable period of time to provide a replacement with the appropriate experience or training.

11. An inmate has the right to receive assistance from another inmate in the use of the law library, in conducting legal research, or in preparing legal pleadings. An inmate providing such assistance may not charge, demand, or receive payment of any kind for his or her services. An inmate, however, does not have the right of assistance from a specific inmate. Assistance to or from an inmate in administrative or punitive segregation, or who is classified maximum custody, except for services of the law

librarian, may be denied or limited by the Department as individual security demands require.

12. The Department shall provide, and inmates shall be entitled to, access to typing paper and at least one properly functioning typewriter for every 100 inmates based on the maximum capacities set out in Section VIII.C of this agreement, and carbon paper, or typing service, at each facility for the preparation of legal pleadings and documents by any inmate. These shall be provided at no charge to an indigent inmate. If the Department has made an individual determination as defined by Paragraph II.C of this agreement that an inmate's access to a typewriter must be limited because of reasons of security or safety, the inmate shall be provided a pen with black ink or pencil and paper with which to prepare legal pleadings or correspondence.

13. The Department shall provide to any inmate in administrative segregation, or who is classified maximum custody, the same access to the law library as set out in Paragraph G.1 of this section, unless an

individualized determination as defined by Paragraph II.C of this agreement has been made that the inmate's use of the law library presents a substantial threat to the security or order of the facility. When such a finding is made, or the inmate is in punitive segregation, the inmate shall be entitled to at least four law books in his or her cell an any one time, and the assistance of a law librarian in locating, researching, and obtaining legal materials, but shall not be entitled to physical access to the law library. If necessary, assistance may be facilitated by secure visits between the inmate and law librarian.

IX. FUTURE MONITORING, MODIFICATION AND ENFORCEMENT OF THIS AGREEMENT

. . . .

B. Modification, Future Enforcement, and Relief from Judgment.

1. Following the report of the Standing Compliance Monitor referred to in Paragraph A.1 of this section or any subsequent report, the Superior Court shall determine the need for continued active court oversight in this matter. At such time as the court determines that oversight, reporting by the Monitor, or reporting by the Department is no longer necessary, active judicial supervision of this case shall terminate, and the obligation of the Department to report to the court on compliance or implementation of these provisions shall cease except where specifically provided by this agreement or the court. However, the court shall retain continuing jurisdiction over this matter for the purposes of enforcement pursuant to Paragraph 2 below or relief from judgment pursuant to Paragraph 4 below.

2. The terms of this agreement shall be considered a final judgment of a prospective nature which is binding upon the Department and its successors in interest, and members of the class. As long as counsel represents the plaintiff class, any action in this case brought before the court seeking enforcement, modification or interpretation of this agreement shall be presented through counsel, unless leave to proceed pro se is otherwise granted by the court. Following the release of plaintiff's counsel, any inmate may bring such action pro se. An inmate must first exhaust the administrative grievance procedure set out in Section VII.E prior to filing an action alleging noncompliance with this agreement.

3. Actions seeking to hold the Department in contempt for alleged violations of this agreement shall be guided by the principle that isolated instances of noncompliance which do not reflect a pattern or practice of violations do not justify a finding of contempt except in situations where unjustified intentional violations are established. A pattern or practice of violations is

established by a showing of repeated violations as to a particular inmate or inmates. A finding of contempt may also lie or the Department's failure to comply, without justification, with a provision of this agreement generally applicable to all inmates or a group of inmates (i.e., three or more inmates). In the event of a court challenge, the burden is on the Department to establish adequate reasons for the justification.

4. The parties acknowledge that a clear showing of material changes in circumstances or controlling law, material changes in the makeup of the inmate population, or a record of good faith implementation and substantial compliance with the provisions of this agreement which ensures that the original and overall purpose of this agreement or a portion thereof will be met, may give rise to a request by either party that it be relieved from judgment, and that all or some provisions of this agreement be vacated and/or modified accordingly. Whether any material change that may occur was foreseen or unforeseen is an element that should be considered in

any request for modification, but shall not de determinative in and of itself. The parties agree that an application to the court to modify or vacate shall be governed by the principles of Civil Rule 60(b)(5) and (6) and the following:

(a) Section VI of this agreement is based on the inmate population as it existed at the time this agreement was executed. The provisions of this section shall continue to have prospective effect insofar as the Department shall be obligated to provide counseling and rehabilitation programs, and vocational and educational services at least equal in availability and kind to those provided in this agreement. The department has discretion, however, without leave of this court or application for relief from judgment, to provide different programs or courses as may be appropriate for the rehabilitative needs of the inmate population. This discretion, however, does not permit the Department to decrease the quality or availability of programs to less than those provided for in this agreement.

(b) Section VII of this agreement articulates the due process requirements for classification,

discipline, administrative segregation, and grievances. The plaintiffs acknowledge that the Department's present system of classification, as outlined in 22 AAC 05.200-276, and of discipline as outlined in 22 AAC 05.400-480, are in compliance with the provisions of this agreement. The provisions of section VII regarding administrative segregation, hearing advisors and grievances require the adoption of new regulations by the Department. The Department shall have a reasonable opportunity to adopt these regulations. The court shall have continuing jurisdiction to hear any complaints by the plaintiffs that new regulations to be adopted by the Department are not consistent with the terms of this agreement. The Department may proceed to amend or update its regulations, without leave of the court or application for relief from judgment provided that the proposed changes do not reduce, restrict, or limit the substantive or procedural due process rights provided for in the classification, administrative segregation, grievance, and disciplinary systems set forth in this agreement. The Department shall,

however, except in an emergency, give notice directly to the plaintiff class of such proposed changes within 60 days of their proposed adoption. The notice shall include a summary of the proposed changes.

(c) Section VIII.A and VIII.B regarding overcrowding shall have prospective effect until emergency overcrowding legislation and regulations described in Sections VIII.A and VIII.B are enacted. Section VIII.E shall have prospective application until emergency overcrowding legislation is enacted or the court imposes capacities and remedies pursuant to Section VIII.F. In the event that the legislation and regulation requirements of Section VIII.A and VIII.B are implemented in a manner consistent with this agreement, the provisions in Section VIII.E shall be superseded by the enacted legislation. If the parties cannot reach agreement as to whether emergency overcrowding legislation which may be enacted is consistent with this agreement, the issue may be presented to the court for resolution.

(d) The parties agree that future questions regarding the implementation and enforcement of this agreement shall be interpreted in a manner that gives meaning to the intent expressed by the parties with consideration for changes to Alaska's adult correctional facilities that may exist at the time. Nothing in this agreement shall be construed to prevent the Department from responding to those rare instances where substantial threats to the security of individuals or a facility exist.

5. No modification to this agreement is binding unless in writing and signed by representatives of both parties, and approved by the court pursuant to Civil Rule 23(e), other applicable rules, or as otherwise ordered by the court.

No. 96-895

Supreme Court, U.S.
FILED
JAN 27 1997

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD H. FRANKLIN, *et al.*,

Petitioners,

—v.—

TIMOTHY WILLIAM HISER,
on his own behalf and on behalf
of all other persons similarly situated,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly applied Alaska case law on *res judicata* when it held, as the Alaska Supreme Court has held, that state prisoners may litigate issues that have not been adequately litigated previously.

LIST OF PARTIES

The petition does not include a list of the parties, and the caption is incomplete. The caption correctly lists the defendants/petitioners: prison officials Richard H. Franklin, Frank Sauser, and Al Terrault. However, the caption fails to indicate that the respondent, Timothy William Hiser, filed this case on his own behalf and on behalf of all other Alaska prisoners similarly situated.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As petitioners concede, the petition raises no constitutional or statutory issues. Pet. at 4.

STATEMENT OF THE CASE

Petitioners' statement of the case is incomplete. Several critical facts are omitted, and some statements are erroneous.

1. Petitioners (defendants) claim that *Cleary v. Smith*, Case No. 3AN-81-5274 Civ. (Alaska Super. 3d Jud. Dist.), challenged "all aspects of the conditions under which inmates were held in Alaska's prison facilities." Pet. at 5. That is not correct. Hundreds of conditions (both systemic and individual) were not challenged in *Cleary*. On the issue of access to the courts alone, *Cleary* did not challenge numerous conditions that have been the subject of dispute within the Alaska prison system, such as defendants' alleged retaliation against law clerks, their refusal to provide the means whereby non-English speaking inmates can obtain meaningful access, and their refusal to provide sufficient space for the storage of legal materials.

2. Another access issue not raised in *Cleary* -- and especially important here -- is defendants' practice of refusing to photocopy documents needed by inmates for litigation purposes. Defendants concede in their petition that the *Cleary* Final Settlement Agreement (FSA) did not address this constitutional issue, Pet. at 5, but they neglect to explain why. The fact is, during the Rule 23 "comment" period on the proposed FSA, an inmate named Hertz filed a motion to intervene in *Cleary* so that he could challenge that policy. The State strenuously opposed his motion, advising the Alaska Supreme Court on appeal that the constitutionality of its photocopying policy "was simply never an issue in

[*Cleary*]." Brief of Appellees in *Hertz v. Cleary*, 835 P.2d 438 (Alaska 1992), at 31. The Alaska Supreme Court agreed, and affirmed the trial court's decision to save this issue for another day. The court held that "[t]he issue of photocopying was not raised in [*Cleary*]." *Hertz*, 835 P.2d at 443.[1]

3. Timothy Hiser did not move to Alaska until 1991, a year after the *Cleary* decree was finalized in 1990. He entered the state's penal system in 1992.

4. Beginning in 1992, as alleged in his amended complaint, Mr. Hiser asked prison officials to photocopy certain documents he needed to initiate a lawsuit. His requests were denied. In accordance with the prison's grievance process, Mr. Hiser administratively appealed. However, the superintendent of the prison, Al Terrault, denied Hiser's appeal, stating (incorrectly) that prison officials "are under no obligation to photocopy anything . . . ." (A copy of Terrault's decision is attached to Hiser's amended complaint.) Hiser then sought relief in federal district court.

5. Hiser's amended complaint presents both a facial and an as-applied challenge. First, it alleges that the defendants have a practice of denying to a class of prisoners the right to photocopy necessary legal documents (the facial challenge). Am. Compl. at 13.[2] Second, it alleges that

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[1] Thus, it is disingenuous for the State to now claim that Timothy Hiser is seeking to "relitigate" the photocopying issue.

[2] Hiser filed this case as a class action pursuant to Rule 23(b)(1)(2), Fed. R.Civ.Proc. Paragraph 4 of the amended complaint states that class certification "is sought only for purposes of declaratory and injunctive relief and not as to damages." The district court dismissed Hiser's complaint prior to deciding the question of class certification.

plaintiff Hiser needed photocopies for litigation purposes; defendants turned down Hiser's repeated requests to provide them; and these refusals "caused plaintiff to suffer difficulty and harm in pursuing his legal claims" (the as-applied challenge). *Id.* at ¶14. Attached to the amended complaint are three examples of the defendants' refusals.

6. Defendants also fail to discuss the evidence (or lack of it) introduced in the trial court. The defendants had the burden of proof on their motion for summary judgment. Yet, they introduced only two facts regarding the photocopying policy. According to the affidavit of prison official Judy Coleman, Pet.App. 20-22, the Alaska Department of Corrections (ADOC): (1) has had the same photocopying policy since 1983, and (2) the policy provides "for free photocopying for legal materials for indigent inmates . . . in connection with pending *or proposed* litigation." *Id.* at 21 (emphasis added.)

7. This evidence is plainly unrelated to Mr. Hiser's as-applied claim. Defendants introduced no evidence whatsoever to contradict Mr. Hiser's claim that in 1992 and 1993 -- policy or no policy -- prison officials repeatedly and improperly denied *his* requests for photocopying, and that these denials resulted in actual harm to Mr. Hiser.

8. The petition contends that Timothy Hiser has only himself to blame for the denials of his photocopy requests. According to petitioners, Mr. Hiser failed to provide "satisfactory evidence" that these photocopies were actually needed. Pet. at 7. That contention is categorically untrue, which explains why defendants cite nothing in the record to support it. In fact, all of Mr. Hiser's requests stated that he needed the photocopies for proposed litigation. His requests, however, were instantly denied for the sole reason that he had no case *pending*. The exhibits attached to the amended complaint prove this.

9. Even with respect to the facial challenge, defendants' evidence is deficient. First "[n]o written memorialization of the policy was submitted." *Hiser v. Franklin*, 94 F.3d 1287, 1289 n.2 (9th Cir. 1996), Pet.App. at 5 n.2. Second, based on the evidence submitted into the record by Mr. Hiser, it is apparent that no such policy existed at Mr. Hiser's prison. As the documents attached to Mr. Hiser's amended complaint demonstrate, he made repeated requests to photocopy documents for proposed litigation, and every request was denied because he had no litigation *pending*. *See, e.g.*, Am. Compl. Exh. H (denying Mr. Hiser's photocopy request "as you have no pending court case involved with this subject.") Moreover, defendants introduced no evidence proving that any of the named plaintiffs in *Cleary* had standing to challenge the photocopying policy, even if it did exist. Defendants' failure to introduce such evidence single-handedly defeats their claim that their photocopying policy could have been litigated in that case. *See Lewis v. Casey*, __ U.S. __, 116 S.Ct. 2174 (1996).

10. Lastly, defendants failed to advise the Court that Mr. Hiser will complete his sentence, and be released, on April 18, 1997.[3]

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[3] Mr. Hiser's release will have some effect on the as-applied challenge, and no effect on the facial challenge. The as-applied challenge seeks: (1) individual damages, and (2) an injunction preventing defendants from continuing to deny Mr. Hiser's legitimate photocopying requests. Mr. Hiser's release will not moot his individual claim for damages. *See Board of Pardons v. Allen*, 482 U.S. 369, 370 n.1 (1987). However, it will moot his request for individual injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). His release will not effect the facial claim. On remand, the class will be entitled to substitute other named plaintiffs and to have the case certified as a class action relating back in time to the date of filing, assuming that the plaintiffs otherwise meet the requirements for class certification. *See United States Parole Commission v. Geraghty*, 445 U.S. 388, 404-07 (1980).

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review

Nothing in the decision below warrants review. As defendants admit, the petition raises no constitutional or statutory claims. Pet. at 4. On the contrary, the Ninth Circuit's decision merely applies Alaska law on *res judicata* to the unique facts of this case.

B. The Decision Below Does Not Conflict With Any Federal Court Decision

The decision below does not conflict with any federal court decision, and petitioners do not claim otherwise. It also does not conflict with any Alaska state court decision, and petitioners do not claim otherwise. On the contrary, the Alaska Supreme Court's decision in *Ferguson v. Department of Corrections*, 816 P.2d 134 (Alaska 1991), *required* the Ninth Circuit to rule as it did.

C. The Decision Below Is Eminently Correct

The district court granted defendants' motion for summary judgment and dismissed on *res judicata* grounds both the facial and the as-applied challenges to defendants' photocopying policy. The Ninth Circuit, applying Alaska law, reversed.

Petitioners note at the outset that the Ninth Circuit was required to apply state law in determining whether *res judicata* barred Mr. Hiser's claims. Pet. at 9, citing *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). Petitioners then argue that the Ninth Circuit misapplied Alaska law. Significantly, however, petitioners do not cite a single Alaska decision in support of their argument.

1. The As-Applied Claim Is Not Barred By *Cleary*

Petitioners, defying logic, argue that the actions they took in 1992 and 1993 (and are still taking) regarding Timothy Hiser could have been litigated in a lawsuit that ended in 1990. They do not explain how this feat is possible.

Petitioners' argument flies in the face of Alaska law (and reality). It is clear in Alaska that "*[r]es judicata* does not act as a bar when the conduct giving rise to the later suit post-dates the conclusion of the first suit. Restatement (Second) of Judgments §24 cmt. f (1982)." *Jackinsky v. Jackinsky*, 894 P.2d 650, 656 (Alaska 1995). This is the universal rule. *See* 18 Wright, Miller & Cooper, FEDERAL PRACTICE AND PROCEDURE §4455 (1995 Supp.)

Mr. Hiser's as-applied claim seeks individual injunctive relief and damages. Mr. Hiser seeks damages to redress injuries he has suffered since 1992, and he seeks injunctive relief to prevent future violations of his constitutional rights. As noted earlier, Mr. Hiser will be released from prison on April 18, 1997. At that time, his request for individual injunctive relief will become moot, but not his claim for damages. *See* n.3, *supra*.

The *Cleary* case sought no damages but only class-wide injunctive relief. Petitioners' argument with respect to Mr. Hiser's damages claim is therefore misguided for two separate reasons. First, the claim post-dates *Cleary* and thus cannot be barred by it. *Jackinsky v. Jackinsky*, 894 P.2d 650. Second, *Cleary* cannot bar Hiser's claim for monetary relief given that *Cleary* sought only injunctive relief. It is well established that an individual claim for damages is not barred by a prior class action that sought only declaratory and injunctive relief. *See* Wright, *supra* (1981 and 1995 Supps.); *Cooper v. Federal Reserve Bank of Richmond*, 467

U.S. 867 (1984).[4]

The only portion of Mr. Hiser's as-applied claim that *Cleary* could conceivably affect is the request for individual injunctive relief. As explained below, *if* defendants' photocopying policy had been litigated in *Cleary*, no request for injunctive relief could be entertained by the federal courts. Under those circumstances, Mr. Hiser (and the class) would be relegated to pursuing the remedies provided by *Cleary*. However, the photocopying policy was not litigated in *Cleary*. *See* pp.1-2, *supra*. Thus, the Ninth Circuit was correct in reversing the dismissal of the as-applied claim, both with respect to damages and injunctive relief.

2. The Facial Challenge Is Not Barred By *Cleary*

Mr. Hiser's amended complaint challenges the facial validity of defendants' photocopying policy. This challenge is made on Hiser's own behalf and of behalf of all other Alaska prisoners similarly situated. The Ninth Circuit correctly held that *res judicata* does not bar this claim. This conclusion is mandated by *Ferguson v. Dept. of Corrections*, 816 P.2d 134, and *Hertz v. Cleary*, 835 P.2d 438.

The plaintiff in *Ferguson* was a present member of the *Cleary* class, and thus could have sought to include his claim in *Cleary*. Instead, he waited until after the FSA was finalized to challenge the constitutionality of ADOC's urinalysis testing policy. The defendant prison officials -- the same defendants here -- contended that Ferguson's claim was barred by the preclusive effect of *Cleary*. The Alaska

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[4] As *Cooper* illustrates, a class action for injunctive relief does not bar a subsequent suit for damages even by persons who were members of the first suit. Obviously, if a present class member is still allowed to bring a subsequent damages action, so is an absent member like Hiser.

Supreme Court rejected this argument. Traditional notions of finality, the court held, must be tempered in class-action litigation in order to protect against due process violations:

> Out of concern that it is unfair to preclude a non-named class member from subsequent litigation, many courts modify the traditional *res judicata* tests when the initial litigation is a class action . . . . Typically courts will only preclude [a non-named] class member in subsequent litigation if the class representatives are found to have made a competent attempt to protect [that person's] interests.

Ferguson, 816 P.2d at 138. Having set this standard, the *Ferguson* court then examined whether the class representatives in *Cleary* made a "competent attempt" to protect Ferguson's interests. The court acknowledged that ADOC's drug testing policies "were evaluated on cross motions for summary judgment" in *Cleary*. *Ferguson*, 816 P.2d at 138. However, these policies "constituted a relatively insignificant aspect of the litigation and negotiations" and no expert testimony was adduced concerning them. *Id.* at 138-39. The court therefore rejected the application of *res judicata*.

Applying the *Ferguson* test, the Ninth Circuit correctly decided that Hiser's facial challenge is not barred by *Cleary*. Even if the named plaintiffs in *Cleary* had standing to challenge that policy -- and petitioners introduced no proof of it in the district court -- the Alaska Supreme Court specifically found in *Hertz* that defendants' photocopying policy had *not* been litigated in *Cleary*. *Hertz*, 835 P.2d at 440. (As noted earlier, the photocopying issue could have been litigated but the defendants refused to allow its joinder.) Therefore, *Cleary* could not bar the subsequent litigation of this claim under controlling Alaska law. *Ferguson*, 816 P.2d 134.

According to petitioners, the Ninth Circuit's decision prevents them from obtaining the benefit of the bargain they reached in *Cleary*. In essence, petitioners claim that by signing the "comprehensive" FSA they shielded themselves from all further lawsuits, even those involving unconstitutional behavior of their staff that might occur in future years and, even if, as the Ninth Circuit concluded here, the unconstitutional behavior arose from a separate set of operative facts.

There are two responses to this argument. In the first place, it is the Alaska Supreme Court that limited *Cleary*'s *res judicata* effect, not the Ninth Circuit. Second, petitioners' argument has no support in Alaska law or the law of any other jurisdiction. Petitioners cite no case that supports such a notion because they cannot. Had defendants wanted *Cleary* to bar a future facial challenge to the photocopying policy, they should have supported Mr. Hertz's effort to include that issue in the *Cleary* litigation. By opposing its joinder, they preserved it for another day. That day has arrived.[5]

Petitioners also claim that the Ninth Circuit's decision "divided Alaska's prison system into two legally distinct classes -- those incarcerated during the *Cleary* FSA negotiation process and those who entered the system afterwards." Pet. at 9. That statement is incorrect in two respects. Admittedly, two classes are created. (Two classes are created in every *res judicata* application.) First, it was *Ferguson* that created them, and not the Ninth Circuit. Second, the two classes are differentiated by *issue*, not inmate. As *Ferguson* dictates, *Cleary* bars relitigation of all issues that

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[5] Of course, as noted earlier, even if the photocopying policy had been litigated in *Cleary*, the FSA could not bar Mr. Hiser's suit in federal court pursuing individual damages.

were competently litigated in *Cleary*, but does not bar any others, regardless of who brings them. Even present class members, such as Mr. Ferguson, are not barred from litigating unlitigated claims. Mr. Hiser's issues were not competently litigated in *Cleary*, and thus are not barred.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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